STATE OF MICHIGAN

COURT OF APPEALS

HOMEOWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

WILLIAM R. TOLLEY, JR., and ANGELA TOLLEY,

Defendants,

and

JASON A. WIEGAND

Defendant-Appellant.

UNPUBLISHED
March 22, 2007

No. 271322
St. Clair Circuit Court
LC No. 05-001344-CK

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant Jason A. Wiegand (Wiegand) appeals by right the trial court's grant of summary disposition in favor of plaintiff Home Owners Insurance Company in this personal injury case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant Angela Tolley (Tolley) and her friend, Rebecca Ringeisen, borrowed a paintball gun and drove around town. Tolley, who was 15 years old at the time, spotted Wiegand and his brother walking along the road. The two girls stopped the car in a parking lot and the brothers approached, with Wiegand walking behind his brother. As they approached, Tolley fired the gun out the driver's side window. Although Tolley maintained that she intended to miss Wiegand, her paintball pellet struck him in the eye and injured him.[1]

[1] Tolley was charged as a juvenile with felonious assault, MCL 750.82, but pleaded guilty to a reduced charge of aggravated assault, MCL 750.81a.

Wiegand filed suit against Tolley and Ringeisen alleging negligence. Plaintiff had issued a mobile homeowners insurance policy to Tolley's father, defendant William R. Tolley Jr., that was in effect at the time of the incident. Coverage, if applicable, extended to Tolley. The policy contained an intentional acts exclusion that provided:

> Under Personal Liability Coverage and Medical Payments to Others Coverage we do not cover:
>
> * * *
>
> 7. Bodily injury or property damage expected or intended by an insured person.

Plaintiff filed the instant declaratory action seeking judgment that the exclusion relieved it of the duty to defend or indemnify the Tolleys in the underlying suit. Plaintiff moved for summary disposition pursuant to MCR 2.116 (C)(10). The trial court found that the exclusion applied and granted plaintiff's motion. The trial court found that even if Tolley did not intend the consequences of her firing of the gun intentionally in Wiegand's direction, her actions created a direct risk of harm that should have reasonably been expected.

We review de novo a trial court's decision to grant or deny summary disposition. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). Similarly, the proper interpretation of a contract constitutes a question of law that we review de novo. *Id.*

Courts construe the terms of insurance policies in accord with well-settled principles of contract construction. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). Insurance companies may define or limit the scope of their coverage under an insurance contract as long as the language leads "to only one reasonable interpretation" and does not contravene public policy or violate applicable statutory regulations. *Id*. at 418. In contrast, when the language in an insurance contract is subject to more than one reasonable interpretation, it is considered ambiguous. *Id*. When the parties' intent cannot otherwise be determined, an ambiguous provision in an insurance contract must be construed against the drafting insurer. *Id*. The mere fact that a policy fails to define a particular term does not render it ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, undefined words are to be given meaning as those words are understood in the common language, taking into consideration the text and relative subject matter. See *Id*. at 356-357; *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997). If the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994).

"The duty to defend is distinct from and is broader than and the duty to indemnify." *St Paul Fire & Marine Ins Co v Mich Mut Ins Co*, 469 Mich 905; 668 NW2d 903 (2003), citing *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452, 550 NW2d 475 (1996). An insurer's duty to defend extends to those cases in which the allegations in the complaint filed against the insured even arguably come within the policy coverage. *Id*. at 451-452; *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989). Generally, any doubt regarding the extent of coverage must be resolved in the insured's favor. *Id*.

Wiegand argues that the trial court improperly used an objective test to determine that Tolley should have reasonably expected that her actions would cause injury to him. Instead, Wiegand argues, the trial court should have applied a subjective test and determined that a question of fact existed as to whether the injury was intended or expected by Tolley.

We disagree. A criminal conviction is admissible in a declaratory action to determine whether an insurer has a duty to defend and indemnify its insured. *Id*. at 687 n 24; *State Farm Fire & Casualty Co v Fisher*, 192 Mich App 371, 376; 481 NW2d 743 (1991). Tolley pleaded guilty to aggravated assault. The crime of aggravated assault consists of assaulting a person without a weapon and inflicting serious or aggravated injury, without the intent to commit murder or to inflict great bodily harm. MCL 750.81a(1). An assault in turn is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery, with a battery being the consummation of an assault. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). A "battery" is the willful touching of the person of another by the perpetrator or by some substance put in motion by him. *People v Rivera*, 120 Mich App 50, 55; 327 NW2d 386 (1982). "For assault and battery, intent is an element of the crime to be proved." *Terry*, *supra* at 662, citing 2A Michigan Criminal Law & Procedure, Assaults (2d ed, 1992 rev ed), § 1024, p 668. See also *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995) (both assault and battery are specific intent crimes requiring intent to injure or intent to put the victim in reasonable apprehension of an immediate battery). Tolley's plea of guilt thus necessarily included either the specific intent to injure Wiegand or to place him in fear of an immediate battery.

Although Tolley's conviction is not dispositive, we conclude that the policy exclusion precluded coverage in this case. Our Supreme Court discussed identical policy language in *Auto-Owners Ins Co v Harrington*, 455 Mich 377; 565 NW2d 839 (1997). The *Harrington* Court held that the language of the exclusion was unambiguous, and required "a subjective inquiry into the intent *or expectation* of the insured." *Harrington*, *supra* at 383 (emphasis in original). The *Harrington* Court noted that "the policy's use of the word 'expected' broadens the scope of the exclusion because 'expected' injuries are the 'natural, foreseeable, expected, and anticipated result of an intentional act.'" *Id.*, quoting *Allstate Ins Co*, *supra* at 675. Thus, the exclusion of bodily injury or property damage expected or intended by the insured precluded coverage for injuries caused by an insured "who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Harrington*, *supra* at 384. That is, coverage was precluded if the insured's claim that he did not expect or intend the injury that flowed from his intentional act defied reason, common sense, and experience. *Id*.

Under the *Harrington* test, the policy precludes coverage here. Tolley's deposition testimony and her plea, taken together, establish that she at least intentionally fired a knowingly loaded, albeit non-lethal, weapon at Wiegand intending to create the apprehension that he would be struck by the projectile. She did so knowing that she had either little or no experience aiming or firing the weapon. If the factfinder were to believe her testimony, she also did so under circumstances where she could not properly see where she was aiming. Under these circumstances, we find that reasonable minds could not differ in determining that she acted intentionally "despite [her] awareness that harm was likely to follow from [her] conduct." Her claim that she did not think she would hit him "flies in the face of all reason, common sense, and experience." *Id*. at 384 (citation omitted).

While the trial court did not properly employ the subjective test as set out in *Harrington*, it correctly granted plaintiff's motion for summary disposition. We thus affirm the trial court's decision. See *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993) (this Court will not reverse a trial court's decision that reached the right result for the wrong reason).

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey